IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 167 of 2001

with

COMPANY APPLICATION No 337 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT LEASE FINANCING LTD.

Versus

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Appearance:

1. COMPANY PETITION No. 167 of 2001
   MR SAURABH SOPARKAR, Sr. Advocate with MRS SWATI SOPARKAR for Petitioner No. 1
   MR PC KAVINA for Respondent No. 1
   MR NV ANJARIA for Respondent No. 1
   MR IJ DESAI for Respondent No. 1
   MS PJ DAVAWALA for Central Government
2. COMPANY APPLICATION No. 337 of 2001
   MR NV ANJARIA for Petitioner No. 1
   MR PC KAVINA for Respondent No. 1

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CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 28/01/2002

ORAL JUDGEMENT

This is a petition filed by the Gujarat Lease Financing Ltd. (hereinafter referred to as `the petitioner - GLFL or `the Company') praying for sanction of the Scheme of compromise and arrangement at Ex.`C' so as to be binding on all the three categories of both `E' series debenture holders and `F' series debenture holders of the petitioner - Company and on the petitioner Company.

2.0 Background facts and the Scheme Highlights

2.1 The Company carries on the business of leasing and hire purchase in respect of movable and immovable properties. The Company commenced its operations in 1985 by providing lease finance to its customers in Gujarat and also in other States. The Company has authorized share capital of Rs.50 crores and the paid-up equity share capital is Rs.27.16 crores.

2.2 The Company issued redeemable non-convertible debentures in `E' and `F' series in the following three categories:-

(a) Cumulative Debentures of Rs.5200/- each
(b) Monthly Income Debentures of Rs.3500/- each
(c) Regular Return Debentures of Rs.2500/- each.

The total face value of all the debentures in Series `E' and `F' taken together was Rs.69 crores. All the debentures were issued on 8th August, 1996 and were to mature after a period of five years i.e. on 8th August, 2001.

2.3 The maturity value of the cumulative debentures was to be Rs.12000/- each on 8th August, 2001. A majority of debentures, which are the subject matter of this petition are Cumulative debentures of Rs.5200/- each and accordingly the discussion will centre around on the maturity value of such Cumulative debentures. As far as the other categories of debentures are concerned i.e. Monthly Income debentures and Regular Return debentures, they have already been paid the interest accrued on the debentures as per the Debenture Deed and in their case the maturity amount on the face of it is the maturity

amount of the principal debenture amount but the learned counsel for the petitioner points out that the maturity value is now worked out in such a manner that it will also take into account the interest paid so far.

2.4 As per the Scheme of Compromise proposed by the Company, in each category, the amount to be paid back by the Company to the Debenture holders is as under:-

| Type of Debentures | Face value of initial investment (Rs.) | Amount required to be paid on maturity as per trust deed (Rs.) | Amount proposed to be paid as per the scheme of compromise (Rs.) | %age |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| Cumulative | 5200 | 12000 | 8400 | 70 |
| Monthly Income | 3500 | 3500 | 2500 | 71.4 |
| Regular Return | 2500 | 2500 | 1860 | 74.4 |

2.5 The petitioner Company has indicated the following factors resulting into adverse financial condition of the petitioner from 1996-97 onwards, warranting reduction of the maturity amount payable to the Debenture holders:-

(i) Recession in the economy and increasing defaults in corporate sector coupled with increased tendency to avail the shelter under BIFR

(ii) Loss of confidence of the depositors in NBFC sector, consequent to CRB episode and defaults by number of companies in repayment of public deposits.

(iii) Increasing competition in retail sector from Foreign Banks, Financial Institutions and Indian Banks, who have funds available at comparatively lower cost resulted into pressure on spreads.

(iv) Over a period of time, the Company's networth is eroded and the loss incurred by the Company till 31st March, 2001 is to the extent of Rs.249 crores, against the sum of total of capital and

reserves of Rs.124 crores.

3.0 The Procedure

3.1 The Company had earlier filed Company Application No.188 of 2001 seeking orders of this Court for convening meetings of the debenture holders of `E' and `F' series and by order dated 12-7-2001, this Court issued appropriate directions in that behalf. The meetings were ordered to be held on 18th August, 2001 and were to be presided over by Mr. Justice BJ Diwan (Retd.), a former Chief Justice of this Court. The quorum for the meeting of debenture holders was fixed at 5; voting by proxy was permitted. Accordingly, the meetings of the debenture holders in `E' and `F' series were convened on 18th August, 2001 under the Chairmanship of Mr Justice BJ Diwan (Retd.).

3.2 The notices of the meetings were advertised, as directed by the order of this Court, in `The Times of India' and `Sandesh', Ahmedabad editions on 24-7-2001. The learned counsel for the petitioner further adds that it was also published in `Gujarat Samachar'. The meetings were accordingly held on 18th August, 2001 under the Chairmanship of Mr Justice BJ Diwan (Retd.). The learned Chairman submitted his report. The report was produced before this Court in Company Application No.188 of 2001 along with an affidavit dated 28-8-2001.

3.3 The number of Debenture holders who were present in person or through proxy in the various categories and those who voted in favour of the Resolution approving the scheme of compromise and those who voted against, with the percentage are set out in a chart hereinbelow (after excluding conditional votes and invalid votes; the particulars of which are already contained in the Chairman's report - the total number of abstentions, invalid votes and conditional votes being comparatively insignificant 87, 5 and 2 for Groups `a', `b' and `c' respectively).

(a) Result of the voting at the meeting of Cumulative Debenture Holders

| Total Votes | Valid | Number | % | Value (Rs.) | % |
|---|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| In favour | 5184 | 99.08 | 6,96,96,000 | 98.78 |
| Against | 48 | 0.92 | 8,64,000 | 1.22 |
| Total | 5232 | 100.00 | 7,05,60,000 | 100.00 |

(b) Result of the voting at the meeting of Monthly Income Debenture Holders

| | Total Valid Votes | Number % | Value (Rs.) | % |
|---|---|---|---|---|
| In favour | 312 | 100 | 35,07,585 | 100 |
| Against | - | - | - | - |
| Total | 312 | 100 | 35,07,585 | 100 |

(c) Result of the voting at the meeting of Regular Return Debenture holders

| | Total Valid Votes | Number % | Value (Rs.) | % |
|---|---|---|---|---|
| In favour | 489 | 98.99 | 1,23,69,645 | 99.53 |
| Against | 5 | 1.01 | 58,410 | 0.47 |
| Total | 494 | 100.00 | 1,24,28,055 | 100.00 |

3.4 The petitioner Company filed the present petition for sanction of the Scheme of Compromise. By order dated 2-9-2001, advertisements were ordered to be published. They were published in `Times of India' dated 10th September, 2001 and `Gujarat Samachar' and `Sandesh'' dated 11th September, 2001.

4. PARTIES IN THE ARENA

In response to the notice issued by this Court and after publication of the advertisement in the newspapers,

objections have been filed by 95 Debenture holders, with the following break-up.

| | | Maturity value as per trust deed (Rs.) |
|---|---|---|
| (a) Cumulative Debenture holders | 58 | 8,04,000 |
| (b) Monthly Income Debenture holders | 06 | 52,500 |
| (c) Regular Return Debenture holders | 31 | 3,20,000 |

They have filed Company Application No.337 of 2001 lodging their objections.

Another set of objections has come from the consortium of Banks which had given finance to the Company and which are claiming their rights as secured creditors having first charge over the properties of the Company.

5. Before setting out the objections lodged against the proposed Scheme, it is necessary to record one clarification coming from the petitioner through the affidavit dated 14-12-2001 of Mr R Srinivasan, General Manager (Finance) of Torrent Pvt. Ltd. which company is one of the promoters of the GLFL and owns 25% of the share holding in GLFL. It has been stated therein that Torrent Pvt. Ltd. has agreed to pay an amount upto Rs.11 crores to GLFL for the purpose of raising the amount of compromise to be paid to Debenture holders in `E' and `F' series from 55% to 70% of the outstanding dues as proposed in the Scheme of Arrangement. It is specifically stated in the said affidavit that the said amount of Rs.11 crores shall be utilised only for repaying the `E' and `F' series Debenture holders for which an appropriate escrow mechanism would be worked out and further that the amount agreed to be given is subject to sanction of the Scheme by this Court and shall be paid within 30 days of the effective date under the Scheme. It is further stated that the amount would be given by way of 0% unsecured debentures or an instrument of a like nature to GLFL and would be repayable only after settling the liabilities of its other secured and unsecured creditors.

In other words, GLFL proposes to pay 55% of the

maturity amount to the Debenture holders in `E' and `F' series from out of its own fund and the remaining 15% amount is to be paid from the funds to be made available by Torrent Pvt. Ltd. specifically for the purpose of paying the same to the Debenture holders in `E' and `F' series and subject to the sanction of the Scheme by this Court.

6. CONTENTIONS OF THE DEBENTURE HOLDERS:

The objections raised by Mr IJ Desai with Mr NV Anjaria on behalf of the above 95 Debenture holders in `E' and `F' series are as under:-

6.1.0 There was noncompliance with various statutory provisions.

6.1.1 There was breach of Section 393 (1)(a). The explanatory statement sent to the Debenture Holders along with the notice of meeting did not mention the powers of the Debenture Trustees. On account of non-disclosure of such a vital issue, the consent given by the Debenture Holders cannot be said to be a valid consent.

6.1.2 There was noncompliance with the provisions of section 117-B (subsections 3 and 4 of Section 117-B) of the Act which provisions have been recently inserted w.e.f.13-12-2000 and also the provisions of Section 119 of the Companies Act.

6.1.3 The SEBI "Debenture Trustees" Regulations, 1993 cast certain duties on the Debenture Trustees. Those duties have not been discharged by the Trustees. The duties cast by Regulations No.15 and 16 on the Debenture Trustees have not been discharged by the Trustees of the Debenture Series `E' and `F' and, therefore, also the proceedings of the meetings held on 18th August, 2001 are vitiated.

6.2 The Resolution was not valid because the notice for convening the meeting did not make a reference to pending proceedings against the Company being the suit before the Debts Recovery Tribunal and the winding up petition filed by two banks out of the consortium of bankers.

6.3 Four lac unsecured depositors were paid Rs.157 crores. The said depositors were paid principal

amount as well as interest as per the terms of deposit without reducing the rate of interest.

6.4 Out of 60,000 Debenture holders only 6331 Debenture holders were present and therefore approval given by only about 8 to 10% of the Debenture holders cannot be said to be valid in the eye of law.

6.5 The Court has power to modify the Scheme under section 392 (1)(b) and accordingly the court may exercise its powers for raising the maturity amount so as to require the Company to pay 80% of the maturity amount immediately and the balance 20% maturity amount may be paid in installments.

7. The thrust of the submissions of Mr PC Kavina for the Banks was that when the Company has agreed to pay only 55% of the Bank's dues, there was no justification for the Company agreeing to pay 70% to the Debenture holders in Series `E' and `F' when the Banks have a better claim over the properties of the Company as holding first charge as against the Debenture holders who are having only the second charge. A detailed reference to the objections made by the Banks will be made hereinafter.

Of course, Mr Soparkar for the Company has also raised a preliminary objection against the locus standi of the Banks. That will also be discussed hereinafter.

8. For the present reference is made to the objections raised by the Banks only with a view to pointing out that the factum of objections raised by the Banks (and not their validity) is one of the factors which is required to be taken into consideration while taking the final decision for granting or not granting sanction to the Scheme of Compromise and Arrangement as proposed by the Company and which has been approved by the overwhelming majority of the Debenture holders who remained present and voted at the meeting held on 18th August, 2001.

9.0 COMPANY'S REPLY TO DEBENTURE HOLDERS

On the other hand Mr Soparkar learned counsel for the Company has made the following submissions in reply to the contentions raised on behalf of Debenture holders in series `E' and `F':-

9.1 There was no breach of any provisions prescribing the procedure for convening and holding meetings

of Debenture holders.

9.2 The explanatory statement sent to the Debenture Holders along with the notice of the meeting convened on 18th August, 2001 had set out all the relevant facts and there was no non-disclosure. The suit filed by one of the Banks before Debts Recovery Tribunal was instituted on 13th August, 2001 whereas the notice for convening the meeting on 18th August, 2001 was sent on 18th July, 2001.

As far as the winding up petition filed by one of the Banks is concerned, although the petition was pending, there was no intention to introduce any element of coercion on Debenture Holders when they were going to consider the Scheme of Compromise and Arrangement but the pendency of the case was discussed at the meeting held on 18th August, 2001.

9.3 As far as payment of the dues of the fixed deposit holders is concerned, the same was done as per the directive dated 28th August, 2000 of the Reserve Bank of India vide letter Ref.DNBS(AH).No.423/R.234/2000-2001, for repayment of the dues of the unsecured fixed deposit holders, reference to which is already made in the order dated 12-7-2001 passed by this Court in Company Application No.187 of 2001.

9.4 As per Section 174(1) of the Act and the Articles of Association, the quorum for the meeting was stipulated by the Court's order dated 12-7-2001.

9.5 More than 98 to 99% of the Debenture holders present and voting have approved the Scheme of Arrangement. In such circumstances, the Court is not required to sit in appeal over the decision taken at the meeting and the Court is required to consider the matter in light of the principles laid down by the Apex Court in the case of Miheer H. Mafatlal vs. Mafatlal Industries Ltd., AIR 1997 SC 506.

DISCUSSION

10. Before dealing with the rival submissions in respect of the objections raised by the Debenture holders, it would be necessary to set out the principles laid down by the Apex Court in Miheer H. Mafatlal vs. Mafatlal Industries Ltd., AIR 1997 SC 506, which

principles are as under:-

"In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meeting as contemplated by Section 391(1) (a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just fair to the class as whole so as to legitimately blind even the dissenting members of that class.

4. That all the necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391 sub-Section (1).

5. That all the requisite material contemplated by the provision of sub-Section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view of to satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members

or creditors or class of creditors as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant."

Contention No.1 : Non-compliance with statutory procedure

11. Now as far as reference to the statutory powers and duties of the Debenture trustees are concerned, it is not possible to accept the contention of Mr Desai for the Debenture holders that such duties were required to be mentioned in the explanatory notice convening the meeting of the Debenture holders. All such duties are prescribed by the Statute and there is no provision that reference to such duties must be made in the explanatory statement with the notice convening the meeting of the debenture holders. Whether the Debenture trustees have failed in discharging their duties is another matter but no proceedings are taken out against the debenture trustees and, therefore, it is not for this Court to probe this issue any further in these proceedings.

Contention No.2: Alleged Nondisclosure in the Notice for the meeting

12.0 The only objection raised on behalf of 95 Debenture holders in respect of the alleged non-disclosure is that the explanatory statement with the notice convening the meeting on 18th August, 2001 did not contain all the relevant particulars such as statutory duties of the Debenture trustees and pendency of the proceedings before the Debts Recovery Tribunal and pendency of a winding up petition.

12.1 As regards non-disclosure of the proceedings before the Debts Recovery Tribunal, there is considerable substance in the submission of the learned counsel for the Company that when the notice for the meeting along with the explanatory statement was sent on 18th July, 2001, no proceedings were pending before the Debts Recovery Tribunal and the suit by one of the Banks was instituted only on 18th August, 2001 and, therefore, no

fault can be found with the Company for not referring to the DRT proceedings in the explanatory statement.

12.2 As far as the pendency of the winding up petition before this Court is concerned, there is no dispute regarding the fact that one winding up petition was pending when the explanatory statement was sent on 18th July, 2001. It is however the submission of the learned counsel for the Company that the Company did not intend to coerce the Debenture holders into accepting the Scheme proposed for compromise and arrangement by making a reference to the winding up petition but the Company was keen to persuade the Debenture holders that payment of 70% of the maturity amount was best that the Company was giving under the circumstances having regard to the depressed market conditions and the performance of other non-banking finance companies.

12.3 Without intending to lay down any general principle or making any general observation that non-disclosure of a pending winding up petition would not result into violation of the statutory requirement of disclosing material facts to the class of creditors, in the facts and circumstances of this case, it is clear that approval granted by a large number of Debenture holders present and voting, was not vitiated on account of non-disclosure of pending winding up petition in the explanatory statement sent along with the notice convening the meeting held on 18th August, 2001. It is not possible to hold or infer that if the notice convening the meeting had disclosed pendency of the winding up petition, over and above the 95 Debenture holders (who lodged their protest at the meeting) others would have turned up in large numbers at the meeting for opposing the proposed Scheme of compromise. The very fact that 98 to 99% of those who remained present at the meeting voted in favour of the Scheme is one of the factors indicating that the Debenture holders were not averse to accepting the Scheme of compromise as suggested by the Company which contemplates payment of 70% of the maturity amount. If anything, the knowledge of the winding up petition would have in all likelihood persuaded the Debenture holders to accept the Scheme rather than take the chance of any adverse orders being passed in the winding up proceedings and to stand in queue after the consortium of banks claiming first charge over the properties of the Company.

Contention No.3: Payment of full amount to Fixed Deposit Holders

13. The grievance made by Mr Desai and Mr Anjaria on the score of the company paying full amount with agreed rate of interest to the unsecured fixed Deposit holders at Rs.157 crores, but not paying full maturity amount to the Debenture holders at Rs.69 crores would have merited serious consideration, if the Fixed Deposit Receipt holders were not already paid off. Of course, the Company conveniently takes shelter behind the Reserve Bank Directive dated 28th August, 2000 but even the mighty Banks did not dare to squeak, much less whisper, before the Reserve Bank regarding the possible consequences of compliance by the Company with the said RBI directive. Presented with this fait accompli, as prudent men, the overwhelming number of Debenture holders decided at the meeting held on 18th August, 2001, to accept 70% of the maturity amount. Hence the Court would not like to interfere with their wisdom.

Contention No.4: A small percentage of Debenture holders present at the meeting

14. Mr Desai thereupon submitted that when hardly 8 to 10% of the Debenture holders were present at the meeting, their views cannot be taken as the view of the entire body of debenture holders.

Under the existing law as contained in Section 174(1) of the Act and a similar provision in Article 103 (a) of the Articles of Association of the GLFL stipulating that five members personaly present shall be the quorum, the grievance, though not frivolous, can not be accepted. The quorum is fixed in terms of the number of persons, and not in terms of the percentage of the number of members or creditors. The concern about lack of participation of shareholders in management of the Company or examination of the need for affirmative vote by a minimum percentage of affected members of a class are larger issues which do not merit any further discussion in the facts of the present case and must await debate in a more appropriate case. For the reasons being presently recorded in the facts of this case, the Court is of the view that looking to the circumstances in which the debenture holders were placed, they did not have too many options.

Contention No.5: Merits of the Scheme of Compromise

15. The learned counsel for the 95 Debenture holders is not in a position to show how the Scheme is violative of any provision of law or is contrary to public policy.

It is not even the case of the objectors that the Company is not acting bona fide or that the interest of any Directors of the Company is adverse to the interest of the debenture holders. It is not even the case of the objectors that the debenture holders present at the meeting did not act bonafide and in good faith or that they made any attempt to coerce the minority at the meeting to accept the Scheme. Hence the test to be applied is whether the Scheme is just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the Scheme is meant. It is true that if nothing had gone wrong, the Debenture holders under the Cumulative interest scheme would have received Rs.12000/as the maturity value of the debenture after 5 years after the initial investment of Rs.5200/- in August, 1996. The rate of interest stipulated was 17.93% i.e. 18% approximately. Under the Scheme of compromise, payment of 70% of the maturity amount works out to 9.83% compound interest i.e. approximately 12.31% simple interest.

16. The Court did find that the suggestion of Mr IJ Desai and Mr NV Anjaria for the Debenture holders (that the Company should have offered a higher maturity amount so as to raise the rate of interest to atleast 12% compound interest or 15% simple interest, in view of the fact that at the time of issue of Debentures that was the rate of interest on other public sector investments like National Savings Certificate and that the unsecured fixed deposit holders were paid full amount with agreed rate of interest which was much higher than 12% p.a. i.e. about 17%) was not unreasonable, but the learned Counsel for the Company submitted that as per the original Scheme which was earlier proposed by the Company, the Debenture holders were to be paid only 55% of the maturity amount, but it was in order to give just and reasonable return to the Debenture holders that one of its group Companies i.e. Torrent Pvt. Ltd. came out with an offer to contribute Rs.11 crores so as to raise the maturity amount from 55% to 70%, even in teeth of the opposition which was likely to come from the Banks which were assured only 55% payment by 31st March, 2002. It is submitted that in view of the depressed market conditions and in view of the performance of the other non-banking finance companies, the details of which are given in a separate list of NBFCs having defaulted in payment, the offer made by the GLFL should be examined in this background and also in light of the challenge being made by the Banks to the offer of 70% payment to the Debenture holders.

17. Having heard the learned counsel for the parties, the Court is of the view that while the suggestion of Mr Desai for the Debentureholders cannot be said to be unreasonable, in view of the fact that performance of other NBFCs is hardly enviable, that even for raising the maturity amount from 55% to 70%, the Company has to borrow funds from another Company in its group and more particularly in view of the stand being adopted by the Banks (who did not oppose the payment of Rs.157 crores to the unsecured fixed deposit holders but have all of a sudden become conscious of their alleged power and capacity to muzzle the Company) opposing payment of even 70% of the maturity amount to the Debenture holders , under the circumstances, the Court is of the view that the Scheme as a whole cannot be said to be unjust, unfair or unreasonable from the point of view of prudent men of business taking a commercial decision beneficial to the Debenture holders in `E' and `F' series. While arriving at this decision, the Court would also like to refer to the rate of interest which is being presently paid by the Government which has substantially reduced the rate of interest on fixed deposits with Banks and even in other investments like Public Provident Fund and Employees' Provident Fund which is compound interest at 9.5% p.a. as against which compound rate of interest offered by the Company to the Debenture holders works out to 9.83%p.a..

OBJECTIONS BY CONSORTIUM OF BANKS

18. Now coming to the objections raised by Mr PC Kavina on behalf of the Banks, the same are as under:-

18.1 The proposed Scheme of compromise is illegal because the Banks, which are secured creditors, are excluded from the Scheme which is being offered to the Debenture holders who are also secured creditors but of a lesser class. The classification being illegal, the Court has no jurisdiction to approve the Scheme. Reference is made to the decision of the Calcutta High Court in Hindustan Development Corporation Ltd. vs.Shaw Wallace & Co. Ltd. , (2000) 38 CLA 97 (Cal.).

18.2 The Scheme is unworkable. The banks have the right to enforce recoveries of their dues under the provisions of the Debts Recovery Tribunal Act and also by seeking winding up of the Company. The banks have the first charge on the assets of the Company particularly the lease assets whereas

the Debenture holders have a second charge. Moreover, the Banks' dues are prior in point of time. If the Banks choose to exercise their rights under the aforesaid statutory provisions, the Debenture holders will get nothing from the Company. Hence the Company has no right to give any favour to the debenture holders without the express consent of the banks.

18.3 There was suppression of material facts inasmuch as the Company did not disclose the pending winding up petition and the DRT proceedings in the explanatory statement to the Debenture holders which was sent along with the notice for convening the meeting on 18th August, 2001.

18.4 When the Banks are being paid only 55% of their dues, the Company cannot offer a higher maturity amount to the Debenture holders to the extent of 70%. Earlier the Banks had agreed to accept 55% from 31-3-2002 only because the Debenture holders were also to be paid 55% of the maturity amount.

18.5 The Company's case that 15% additional maturity amount is to be paid to the Debenture holders from borrowings from a group company does not alter the fact that the entire maturity amount is going to be paid by the Company itself. The source of funds has no bearing on the question involved.

COMPANY'S REPLY TO BANKS

19. On the other hand, Mr Soparkar learned counsel for the Company has raised the preliminary objection that the Scheme of compromise having been offered only to the Debenture holders in Series `E' and `F', it is for them alone to raise any objection to the Scheme and the Banks have nothing to do with the Scheme and, therefore, they have no right to object to the scheme offered to the Debenture holders in `E' and `F' series.

Without prejudice to the said preliminary submission, Mr Soparkar has made the following submissions:-

19.1 There is no question of any illegal classification; on their own showing banks claim a higher status over the Debenture holders; hence it cannot be said that the Banks and the Debenture holders belong to the same class.

19.2 Merely because the Banks can proceed with their cases before the DRT or proceed with the winding up petition, it does not mean that the Scheme becomes unworkable. The question is not whether the Banks can affect the Scheme. The question is whether the Scheme as offered to the Debenture holders is a just and fair Scheme so far as the class of Debenture holders in `E' and `F' series is concerned. The Banks cannot be said to be necessary or proper parties who are affected by the Scheme.

19.3 The argument regarding alleged nondisclosure is already dealt with in reply to the submissions of Debenture holders. The Banks have nothing to do with the same.

19.4 On merits of the Scheme, it is submitted that under the Scheme, the Debenture holders in `E' and `F' series give up their right to the extent of 30% of their maturity amount whereas the Banks are not only being paid 55% of their dues (as on 1-4-1999) by 31-3-2002 but they are not required to give up or waive their rights for the balance amount and the Company proposes to repay their dues upon making recoveries of its outstanding dues. It is pointed out that the Company's assets are locked up with many units which have been declared sick before the BIFR or from whom the recoveries are yet to be made and, therefore, as and when recoveries are made, the Banks are going to be paid. It is, therefore, submitted that in any view of the matter, the Scheme offered to the Debenture holders in `E' and `F' series is not unreasonable qua the Banks.

19.5 The Company is paying only 55% of the maturity amount as the balance 15% is being paid by the promoters from their own funds. The total liability is about Rs.79 crores. Under the Scheme, the total amount payable comes to Rs.55.26 crores. Out of the said amount, only about Rs.44.26 crores is being paid from the funds of the Company and the remaining amount of Rs.11 crores is being contributed by the promoters. It is also pointed out that the Banks do not have a charge over the funds being made available by the Company such as refund from the Income Tax Department.

Locus Standi of Banks

20. Having heard the learned counsel for the parties, it appears to the Court that there is considerable substance in the submission made by the learned counsel for the Company that when the Scheme of compromise offered to the Debenture holders in `E' and `F' series does not even purport to affect the rights of the Banks, the Banks have no right to oppose the Scheme of compromise between the Company and the Debenture holders in `E' and `F' series.

21. Section 391 (1) provides that where a compromise or arrangement is proposed between a Company and its creditors or any class of them, the Court may on the application of the Company or of any creditor order a meeting of the creditors or class of creditors, to be called, held and conducted in such manner as the Court directs. It further provides that if a majority in number representing three-fourths in value of the creditors or class of creditors, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, such compromise or arrangement, if sanctioned by the Court, be binding on all the creditors or all the creditors of the class and also on the Company. The Act itself thus permits compromise between the Company and a class of its creditors and it is not necessary that the compromise must be between the Company on the one hand and all its creditors on the other hand.

Banks' Objection No.1

22. Mr Kavina for the Banks has however vehemently submitted that both the Banks as well as the Debenture holders in series `E' and `F' belong to the same class of secured creditors and, therefore, the Company can not be permitted to enter into a Scheme of compromise only with the Debenture holders leaving out other secured creditors like the Banks. Mr Kavina has relied on the decision of the Calcutta High Court in Hindustan Development Corporation Ltd. vs. Shaw Wallace, (2000) 38 CLA 97 (Cal.)

On the other hand, Mr Soparkar has relied on the decision of this Court in Manekchowk and Ahmedabad Mfg. Co. Ltd. In re, 40 Company Cases 819 for justifying the classification.

23. In Hindustan Development Corporation Ltd. vs.

Shaw Wallace & Co. Ltd. (supra), the Calcutta High Court held that a meeting cannot be taken to have been held in the manner directed by the court if the provisions of the statute regarding the advertisement of the scheme etc., had been disregarded or if the secured creditors were clubbed with the unsecured creditors. In paragraph 23 of the judgment, the Court referred to the decision of the Madras High Court in Coimbatore Cotton Mills Ltd. vs. Lakshmi Mills Co. Ltd. (1980) 50 Comp. Cases 623 (Mad.) to the effect that if a class whose interests are affected by a scheme does not assent to the scheme or approve it at a meeting convened under section 391, the Court will have no jurisdiction to confirm the scheme, even if it considers that the class concerned is being fairly dealt with or that it would approve the Scheme and that this factor is jurisdictional in the matter of confirmation of the Scheme.

The decision of the Calcutta High Court in Hindustan Development Corporation Ltd. vs. Shaw Wallace (supra) or the decision of the Madras High Court in Coimbatore Cotton Mills Ltd. vs. Lakshmi Mills Co. Ltd. (supra), however, do not throw any light on the exact controversy at hand, because there is no disregard of the provisions of the statute regarding the advertisement of the Scheme, nor is there any clubbing of two different classes of creditors.

24. On the other hand, in Manekchowk and Ahmedabad Manufacturing Co. Ltd., In re (supra), this Court has laid down the following principles:-

> "When the judge's summons is taken out for seeking directions for convening meetings a duty is cast on the company to put proper materials before the Court so that the Court may give proper directions for separate meetings of different classes of creditors and members. If the creditors and members are not properly classified and if the meeting of the proper class of creditors and members is not separately held, the scheme approved at such meeting cannot be sanctioned, vide Court Practice Note in (1934) Weekly Notes 142. The responsibility for determining what creditors are to be summoned to any meeting as constituting a class is of the applicant company and if meetings are incorrectly convened or constituted or an objection is taken to the presence of any particular creditor as having interests competing with the others such objection if successfully taken at the hearing of

the petition for sanctioning the scheme the company must take the risk of having it dismissed.

It is always a moot question what constitutes a class. Buckley on the Companies Acts, 13th edition, page 406, has observed that it is a formidable difficulty to say what constitutes a "class" of creditors. The creditors composing the different classes must have different interests. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes. "Class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (vide Sovereign Life Assurance Co. vs. Dodd). Speaking very generally, in order to constitute a class, members belonging to the class must form a homogenous group with commonality of interest. If people with heterogeneous interests are combined in a class, naturally the majority having common interest may ride rough shod over the minority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The Company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise it may be discriminatory. At any rate, those who are offered substantially different compromises each will form a different class. Even if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be homogenous and must have commonality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of classification. The test as stated earlier would be that a class must be confined to those persons

whose rights are not so similar as to make it impossible for them to consult together with a view to their common interest.

(emphasis supplied)

25. The aforesaid decision, therefore, clearly contemplates that those who are offered substantially different compromises each will form a different class. Of course, the Banks are not offered any compromise not because they are not considered to be secured creditors but because none of their legal rights are required to be waived by the Banks and, therefore, their interests are not affected by the Scheme whereas the Debenture holders in `E' and `F' series are required to give up their rights over 30% of the maturity amount. Hence the very fact that the Debenture holders of `E' and `F' series are offered only 70% of the maturity amount makes them a different class by itself. This Court has also recognised that if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the Scheme, such groups must be treated as separate classes for the purpose of the Scheme. It is, thus, clear that the Debenture holders in `E' and `F' series who are required to give up their claim over 30% of the maturity amount constitute a separate class and when the Company does not require any waiver of rights by the Banks, there is no question of offering any Scheme of compromise to the Banks. The fact that the Banks and the company agreed that the Company will pay 55% of the Banks' dues by 31-3-2002 and that further stages of recovery will be determined after 31-3-2002 only pertains to the question of recovery of the amount and it does not have any effect on the Banks being required to give up any of their rights. Hence there is no merit in the contention raised on behalf of the Banks that the Company has resorted to illegal classification.

Banks' Objection No.2

26. As regards the objection that since the Banks have the power to styme the Scheme by having recourse to its remedies under the provisions of the Debts Recovery Tribunal Act and under the Companies Act and then the Debenture holders in `E' and `F' series will get nothing, it is not necessary for this Court to consider any such hypothetical submission. The Court is merely concerned with the question of legality, justness and fairness of the Scheme of compromise between the Company and its Debenture holders in `E' and `F' series. Since the Scheme does not purport to take away the powers and rights of the Banks, the submission made by Mr Kavina for

the Banks cannot be said to be germane on the subject matter of the present petition.

26A. Banks' Objection No.3 is already dealt with in para 12.

Banks' Objection No.4

27. Coming to the question of justness and reasonableness of the amount offered to the Debenture holders vis-a-vis the claims of the Banks, as already indicated above, since the Banks are not required to give up or waive any of their rights, they would have no locus standi to raise any objection. Apart from that aspect, in view of the fact that the amount of Rs.11 crores which will raise the maturity amount proposed to be paid to the Debenture holders in `E' and `F' Series from 55% to 70% is going to be contributed by another company which belongs to the group of promoters of the GLFL, it cannot be said that there is any unfairness on the part of the GLFL in giving preferential treatment to the Debenture holders in `E' and `F' series. This is all the more so, when one considers the fact that the Banks did not oppose the payment of dues of the unsecured Fixed deposit holders by the GLFL. The submission of Mr Kavina that the said payment was made as per the directives of the Reserve Bank of India, does not carry the Banks' case any further as the Debenture holders in `E' and `F' series have better legal rights than the fixed deposit holders, as already indicated above. The only reason why the Court has not accepted the submission of Mr Desai for the Debenture holders for making an endeavour for increasing the maturity amount above 70% is the intransigent stand being adopted by the Banks for objecting to any amount being available to the Debenture holders beyond 55%, as the GLFL is hopeful of persuading the Banks to take a more reasonable stand by making some more funds available to the Banks instead of raising the funds proposed to be paid to the Debenture holders in `E' and `F'series.

Banks' Objection No.5

28. The contention urged on behalf of the Banks that source of funds is not relevant, cannot be accepted. The Banks do not and cannot have any charge over the contributions from another Company of the promoter group or over the refund amount received from the Income-tax Department, even if the refund pertains to the year/s prior to the year in which the Debentures in question were issued.

Stand of the Central Government

29. As far as the Central Government is concerned, Ms Parinda J Davawala, learned Additional Standing Counsel for the Central Govt. has produced on the record of these proceedings the letter dated 6-11-2001 from the Registrar of Companies with a copy of the letter dated 16-10-2001 from the Regional Director to the Registrar of Companies. It is submitted by the learned Additional Standing Counsel that the Central Government does not have any objection to the Scheme of compromise and that as per the Central Government, the matter may be left to this Court to be decided on merits. The letter dated 16-10-2001 merely makes a reference to the winding up petition filed by the Union Bank of India and Company Application No.187 of 2001 in which the Company had obtained ad-interim relief to restrain the Debenture holders / trustees from taking any legal action in respect of the default committed in non-redemption of debentures.

As far as reference to Debentures in `G' series is concerned, the Scheme does not purport to cover them as the Scheme is only confined to Debenture holders in`E' and `F' series and therefore the question of obtaining consent of the Debenture holders in `G' series does not arise.

As far as the consent from the secured creditors like the Banks is concerned, their objections have already been dealt with hereinabove.

CONCLUSION

30. In view of the above discussion, the Court sees no impediment to sanctioning the Scheme of compromise between the Company and its Debenture holders in `E' and `F' series which is at Annexure `C' to the petition, as per which the Company agrees to pay the following maturity amounts as on 8th August, 2001 to its Debenture holders in `E' and `F' series. To Cumulative Debenture holders of Rs.5200/- each, the Company agrees to pay Rs.8400/- per each debenture. Similarly, against the Monthly Income Debentures of Rs.3500/-, a lumpsum amount of Rs.2500/- each is to be paid for each debenture. As regards the Regular Income debentures of Rs.2500/- each, a lumpsum amount of Rs.1860/- shall be paid per each debenture.

31. At this stage, Mr Soparkar for the Company invites the attention of the Court to Reserve Bank's directives vide letter Ref.No.DNBS (AH). No.423/R.234/2000-2001 dated 28th August, 2000 which prohibits the Company from accepting any further public deposits or from renewing the maturity deposits in any manner. Mr Soparkar points out that the amount of Rs.11 crores to be borrowed by the Company from Torrent Pvt. Ltd. is for the limited purpose of paying the same to the Debenture holders in `E' and `F' series, as already stated in the affidavit dated 14th December, 2001 and that appropriate clarification may be issued by this Court so that the borrowings to be made by the Company with good intention of paying the amounts to the Debenture holders in `E' and `F' series may not be construed as a violation of the directives of the Reserve Bank of India.

32. It is obvious that in view of the financial condition of the Company, the Reserve Bank had restrained the Company from accepting any further public deposits. However, the amount of Rs.11 crores or any higher amount being borrowed by the Company is not from the public at large, but its own promoter group which has agreed for the aforesaid lending for the purpose of increasing payment of maturity amount to the Debenture holders in `E' and `F' series from 55% to 70%. Hence, the borrowing by the Company from its promoter group for payment of maturity amount and interest to the debenture holders would not amount to acceptance of any public deposit prohibited by the Reserve Bank of India's directive dated 28th August, 2000.

33. Mr Soparkar further points out that under the interim orders dated 12-7-2001, the Company had deposited a sum of Rs.27.65 crores with the BNP Paribas and that the amount lying with the said Bank as on today is Rs.35 crores plus interest thereon which amount is lying in a separate `No lien" bank account with the aforesaid bank at 203, Sakar II, Ellisbridge, Ahmedabad-6. By the order dated 12-7-2001, the Bank was directed not to permit any withdrawal from the said amount for any purpose other than for payment of debenture holders under the present Scheme of Arrangement.

34. Considering the fact that the aforesaid amount is already earmarked for payment to the debenture holders and considering the fact that what is being paid to the debenture holders is only about 70% of the maturity amount which was due and payable under the debenture instruments as on 8th August, 2001, it would be in the

interest of justice to direct the Company to pay the debenture holders interest at the rate which has accrued in the aforesaid no lien account on the entire amount due and payable under the Scheme.

O R D E R S

35. Accordingly, the Scheme of Compromise between the Gujarat Lease Financing Ltd. ( the Company) and its Debenture holders in series `E' and `F' at Annexure `C' to the petition is sanctioned and the following directions are issued:-

I The Company shall pay its debenture holders in `E' and `F' series the following maturity amounts as on 8th August, 2001:-

(a) Cumulative debentures : Rs.8400 per debenture
(b) Monthly Income : Rs.2500 per debenture
debentures
(c) Regular Return : Rs.1860 per debenture
debentures

II The aforesaid amounts shall be paid by the Company to the debenture holders along with interest for the six month period from 8th August, 2001 to 7th February, 2002 at the rate of interest which has accrued on the amount/s deposited by the Company in the `no lien account' with BNP Paribas pursuant to the Court's order dated 12th July, 2001.

III The amount/s shall be paid by the Company to the debenture holders by 28th February, 2002.

36. Now that the Scheme of compromise and arrangement between the Company and its Debenture holders in`E' and `F' series is sanctioned, the Court directs that the BNP Paribas shall permit the Company to withdraw the amount lying with it in the aforesaid `No lien Account" only for the purpose of payment to the Company's debenture holders in `E' and `F' series and for no other purpose.

37. The petition is accordingly allowed in the aforesaid terms. Rule is made absolute to the aforesaid extent with no order as to costs.

Company Application No.337 of 2001 also accordingly stands disposed of.

The fees for the petition shall be paid to the

learned Additional Standing Counsel for the Central Government at the rate of Rs.3500/-.

38. At this stage, Mr PC Kavina learned counsel for the Banks prays for stay of operation of this order for some time to enable his clients to have further recourse in accordance with law.

39. It is not necessary to entertain this prayer, because Mr Soparkar for the Company states that the Company will be despatching the cheques/ redemption warrants to the Debenture holders after 15th February and complete the process of despatching by 28th February, 2002.

(M.S. Shah,J)

zgs/-